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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 400

CITY OF MARION, ILLINOIS, A MUNICIPAL CORPORATION; CONTINENTAL ILLINOIS BANK AND TRUST COMPANY, A CORPORATION; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, A CORPORATION; AND RAY C. CARROLL, AS TREASURER OF THE CITY OF MARION, ILLINOIS,

Petitioners,

VS.

BEN SNEEDEN, AS RECEIVER OF THE CITY NATIONAL BANK OF HERRIN, ILLINOIS,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of the City of Chicago, as Amicus Curiae.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 368

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STATEMENT.

MAY IT PLEASE THE COURT:

The City of Chicago seeks by its petition to present a feature of the above entitled cause which does not readily appear from the proceedings involving the deposits of a smaller municipality—that is, the fact that in the case of larger municipalities it is impossible under present condi-

tions to obtain protection for public funds unless the depositaries for same have the right to pledge their assets for this purpose.

The City of Chicago is a municipal corporation located in the State of Illinois and within the seventh judicial circuit. It has a population of approximately three and one-half millions and has large financial and property interests, and collects and disburses large sums of money. The law of the State of Illinois requires that its funds should be kept in depositaries selected from national and state banks which submit bids for the payment of interest thereon. Its funds accumulate to such an extent that it is not unusual for it to have $125,000,000 at one time on deposit in the various depositaries named by it for the purposes of such deposits. The loss of any large amount of this money through the insolvency of any city depositary would be so serious a blow to the city that its effect might be calamitous.

Prior to the year 1930 the various national and state banks located in the city made offers in response to the annual advertisement for bids, and when selection of these was made for the purpose of naming depositaries, so many of these banks qualified for the purpose that sometimes as many as 225 banks were designated as official depositaries for city and school funds for said city.

When so many depositaries were named the funds were distributed so that it was easy for the various depositaries to obtain bonds of accredited surety companies covering the deposits.

The ordinances of the city authorized the deposit of money in such depositaries in case the depositaries furnished adequate surety bonds or furnished collateral of

certain kinds designated in the ordinance, namely, federal government securities and bonds of the State of Illinois or of the City of Chicago or of the board of education of the City of Chicago or tax anticipation warrants of said city or school board.

Since the beginning of the year 1930 there has been a constant falling off of the number of banks which were able to bid and qualify as depositaries for the city. The surety companies whose bonds were acceptable have also become more careful in assuming risks, and the number of such surety companies that were sound have been somewhat reduced.

As a result of these conditions and the general financial situation in the country the City of Chicago was able to name only four depositaries for its funds for the year 1933 and it is not likely to secure any more for the year 1934.

The said city at one time had as much as $65,000,000 on deposit in one of its depositaries at one time. It still has immense sums on deposit, and in the year 1933 had as much as $18,000,000 on deposit in one of its depositaries at one time. It is likely to have funds amounting to $25,000,000 or more in one depositary within the near future.

In accepting bonds of surety companies the officers of the city have followed the rule adopted by the United States Treasury department and have accepted bonds only to the extent of ten per cent of the capital stock of a surety company for any single risk. This has been considered the only safe rule to follow. Under present conditions, if this rule were followed, it would be impossible to secure bonds covering the maximum amount that the city would deposit in one depositary, since there are only about seventy-five accredited surety companies in the country and

the total of ten per cent of their capital stock accounts to only $18,869,000. Consequently, if all of the surety companies were to join in a bond for one of these depositaries (which is not practicable), such a bond would not be sufficient to protect the city against loss in case a large financial institution acting as its principal depositary should close its doors. Under the alternative provision of the ordinances of the city which authorizes the acceptance of collateral security from the depositary, the city was able to obtain adequate security to protect its large deposits, up to the time of the rendering of the decision in this cause by the Circuit Court of Appeals on April 25, 1933. Since then its deposits have been without protection of any kind. If the decision of the Circuit Court of Appeals should become the established law of the jurisdiction this means of securing its deposits would be cut off, and the deposits of the city of Chicago in its official depositaries would remain without security as they are at present.

That there is necessity for the securing of the deposits in one or the other manner provided for by ordinance was demonstrated within the last few years, during which it was necessary for the said city to have recourse to both the surety bonds and the collateral security in cases where the accepted depositaries closed their doors.

If any large amount of the funds of the city of Chicago were to be lost or tied up through the closing of one of its important depositaries, the financial conditions which now prevail and which are hampering the financial institutions of the city of Chicago would make it difficult to so handle the situation that the municipal government could function.

It is therefore of great importance to the said city that this phase of the situation should be presented to this hon-

orable court, in order that it may be considered in connection with the legal questions involved in the above entitled cause.

ARGUMENT.

The City of Chicago is vitally interested in the main question at issue in this case—the question of the right of a national bank to pledge its assets as security for public funds deposited with it.

The case as presented in the court below involved a comparatively small sum belonging to the City of Marion, a city under the commission form of government. The amount on deposit for the City of Marion was $16,430.00. While the loss of this money might be a serious blow to that city, it is not enough to disrupt the municipal government. Any one of hundreds of financial institutions in the State of Illinois could easily restore the disturbed situation by advancing to said city, on legally authorized bonds of the municipality, the full amount of the money lost, and the loss could then be distributed over a period of years through the payment of same by the taxpayers in liquidation of the bonds. That in itself presents the case in a different aspect from what would be presented if a large municipality was involved. But there are other features to be considered.

The Circuit Court of Appeals, in its opinion (64 Fed. (2d) 721, 725), stated that the case hinged on the competition between banks in their eagerness to secure deposits. The court said:

> "The necessity urged is based upon competition among banks in their ever growing desire to obtain

deposits. The employment of such means for that purpose seems to us to be wholly unworthy of, and inconsistent with, the object for which banks are organized, and it is by no means certain from this record that the demand for such procedure is general in its extent, or that it is not actuated by certain depositors rather than by the banks."

If it was simply a question of competition between national and state banks, the city of Chicago would have no great interest at stake. It would be a matter of small concern whether one or another depositary of its funds secured the junior share of its deposits or whether such depositary made a profit or sustained a loss thereon. What it is interested in is the fact that under present conditions, if the decision of the court below becomes the established law of the jurisdiction, the city would be left without any protection or security for its funds.

The two sections of the statute under which the city of Chicago selected its depositaries and deposited its funds up to the present time read as follows (Cahill's 1933 Ill. Rev. Stat., c. 24, par. 287, 288):

"Sec. 5. It shall be the duty of the comptroller at least once in each year and not later than the first day of December of each year, to advertise for bids from all regularly established national and State banks doing business within the city, for interest upon the money of the city so to be deposited in such banks. Such bids shall be reported to the city council for its information and consideration not later than the fifteenth day of December of each year, to the end that an award or awards may be made upon such bids by the city council prior to the end of each fiscal year. Such awards shall be made to the highest and best responsible bidder or bidders. The city council shall have the power to reject all bids and to designate as many depositaries as it deems necessary for the protection of the city's interests, and award bids accordingly. No bid shall be awarded to any financial insti-

tution other than a regularly organized State or national bank, and no moneys shall be deposited with any bank or such award be effective until such depositary shall have delivered to the comptroller a bond to the city in such sum and with such sureties as the city council shall approve, conditioned in like manner as other official bonds given by public officials charged with the custody of money. The city council shall have power to pass all necessary ordinances to carry the foregoing provisions into effect and provide rules applicable thereto. The city treasurer shall be discharged from responsibility for all moneys deposited by him pursuant to order or ordinance of the city council with any depositaries who may be so named and qualified, and in fixing the amount of the bond of the city treasurer due regard shall be had by the city council of the effect of any such deposits upon the actual amount of money for which the city treasurer may from time to time be held responsible. When money is once deposited in such depositary or depositaries, no check or draft shall be drawn against such deposit unless accompanied by a warrant attached thereto, drawn in accordance with the provisions of article VII of the act above referred to by its title, a duplicate of said warrant to be retained by the treasurer.

Sec. 6. The city council shall have the power to fix the amount and penalty of the bonds of all city officers and of all municipal employees charged with the custody of money or property. It shall also have the power to require the giving of additional bonds, and to increase or decrease the amount and penalty of the bond of any officer, and to require the giving of a new bond where the security on an original bond has become either insufficient or in any way impaired, upon penalty of removal from office. The power vested in the city council by this section shall be so administered as to protect the interests of the city from danger or financial loss, and shall never be used as a means of removing any person from the civil service of the city without a hearing before the Civil Service Commission, in accordance with law. In any such case the city employee or official whose office is sought to be declared (vacant) by reason of a failure to give a new,

additional or increased bonds, shall have the right to have a hearing before the Civil Service Commission upon the question so involved."

The above was changed in June of the present year by eliminating the provision limiting the depositaries to banks doing business in the city, but the requirement that the depositaries shall be national or state banks remains. Otherwise the two sections remain the same.

Pursuant to the authority given by the statute the city adopted ordinances providing for the selection of depositaries and the making of deposits therein. Among the ordinances so adopted was one that is now known as Section 68 of the Revised Chicago Code of 1931, which reads as follows:

"68. Classification of bonds.) No bond shall be accepted by the Comptroller nor approved by the City Council unless it shall come within one of the two following classifications and none other unless otherwise directed by the City Council:

First. The joint indemnifying bond of the depositary with one or more of the surety companies incorporated or licensed to do business in the State of Illinois and acceptable as surety to the Comptroller.

Second. The joint indemnifying bond of the depositary with one or more individuals as surety thereon, and with collateral security as herein provided which is to be deposited with the bond by either the depositary or by one or more sureties on the bond. Provided, that a bank which can qualify as an active bank may give its joint indemnifying bond with one or more individuals as surety thereon without depositing collateral security therewith. And provided, further, that where a bank that shall qualify as an active bank submits collateral security of the kind provided for herein with its bond it may present its joint indemnifying bond with two or more of its officers or directors as surety thereon and it shall not be necessary for such sureties to make affidavit of the value of their property.

> The collateral security required hereunder shall consist of outstanding unmatured United States Government bonds or other securities issued by the Federal government, bonds of the State of Illinois, or full faith and credit bonds or tax warrants of the City of Chicago or Chicago Board of Education, the total face value of such securities to be deposited as collateral by the personal sureties on any bond of such depositary to be at least equal to the amount of city or school money to be deposited under the award made to such depositary."

Inasmuch as section 5 of the statute quoted above contemplates that a depositary is in effect an officer of the city (it being required to give an official bond the same as other officers), it follows that the provision of the ordinance* with respect to the giving of collateral security has the force of a statute. (The laws relating to the bonds of these depositaries form a part of the official bond of the depositary. *Estate of Ramsay* v. *People,* 197 Ill. 572.)

Accordingly the city officials have relied upon pledges made by depositaries of city funds as one of the means, and as is indicated herein in recent years the only practical means, whereby deposits of such funds may be adequately protected.

In normal times the officers of the city of Chicago had no difficulty in securing as many depositaries as were

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* It is not necessary to set forth the other ordinances governing the naming of depositaries, but they were such that under their terms it was the practice of the city to advertise for bids for interest each year and to award the deposits accordingly.

By similar laws relating to all other municipal governments in the state, including counties, the requirements as to depositaries for public funds and the making of deposits therein were extended to all public authorities in the State of Illinois, so that the practice of selecting national and state banks as official depositaries is now universal throughout the state, and in most cases it is mandatory.

deemed necessary. In some years it had as many as 225 depositaries.

During the years when the money of the city was thus distributed among a large number of depositaries it was in a position to demand ample security from each in the form of indemnifying bonds of accredited surety companies, of which there were 75 or more in the United States, practically all doing business in the State of Illinois. The acceptance of such surety company bonds was predicated in each case on the solvency of such company and a limitation of the risk in accordance with the rules established by the United States Treasury Department, which accepts a surety company on a single risk only to the extent of ten per cent of its capital stock. When the depositaries numbered 225 or any other large number the surety companies were able to qualify on the various bonds. But during the last four years there was a constant shrinking of the number of banks which qualified as city depositaries, with the result that only four city depositaries qualified and were accepted for the current year. It is now no longer possible to secure surety company bonds for these depositaries, because all the surety companies of the country combined, if limited to ten per cent of their capital stock, could not produce a bond of sufficient amount to cover the amounts necessarily deposited in one of the depositaries, to say nothing of the fact that it would be impracticable to get 75 or more surety companies to combine on one bond.

The deposits of the City of Chicago in a single depositary have run as high as $65,000,000.00, and even during the current year, when the city's funds were exceptionally low, there was as much as $18,000,000.00 of its money on deposit at one time in one of its depositaries. Obviously, such large

sums cannot be secured by bonds of surety companies under conditions existing at the present time of which this court will undoubtedly take judicial notice.

It follows that, if this court should decide that national banks cannot pledge their securities for the protection of deposits of public money, the large sums which must be deposited in them by the City of Chicago will be subject to loss in case the depositary closes its doors. What the consequences may be in case of the loss of any considerable sum can only be conjectured. It is practically certain that under present conditions such a loss running into many millions could not be replaced through the flotation of a bond issue, and the municipality would probably be reduced to the necessity of abandoning essential governmental functions in the face of a situation where many thousands of men within its borders are without employment and facing destitution.

We submit that there is nothing in the controlling decisions or statutes compelling a conclusion which results in such disastrous consequences. The only decision of the Supreme Court of Illinois on the question holds that a bank possesses the power to pledge its assets to secure such deposits. (*Ward* v. *Johnson,* 95 Ill. 215.) This court will undoubtedly adhere to the established rule of declaring such decision on the state law as binding on it. (*Truax* v. *Corrigan,* 257 U. S. 312; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346.)

The recent decision of the Supreme Court of Illinois, rendered October 21, 1933, in *People, ex rel. Nelson* v. *West Englewood Trust and Savings Bank* (No. 21850 not yet reported) also deserves mention, although that case involves state funds. In holding that a depositary act requiring the depositary to furnish a bond as security for

state moneys, did not repeal or abrogate the common law right of the state to priority upon the insolvency of the depositary, the court stated:

> "In the present case it seems to us that inasmuch as all authorities agree that the primary purpose of a depositary law is to safeguard the revenues, it is better to say that the law was intended to supplement or add to the security furnished by the rule of the common law than to say that it is repugnant to that rule. Repeal of laws by implication is even less favored when they affect the sovereign than when they affect the citizen."

By the same line of reasoning it is clear that the requirement of the "Commission Form of Government" act relied upon by the Circuit Court of Appeals as one of the grounds of its decision "was intended to supplement" rather than abrogate the right of the City Treasurer to demand security, other than a surety bond.

Other statements in that case indicative of the strong public interest in securing the safety of public funds are particularly pertinent:

> "At common law the right of preference extended to every character of debt due the sovereign. The rule was not invoked to give him any personal advantage. It was based upon the higher motive of public policy as being essential to obtain revenues to sustain the government. Conditions in the American States present no different situation. Orderly government cannot be maintained without adequate revenues, and it seems that the right to protect them without dissipation or loss ought to be the undoubted prerogative of the people unless and until it shall have been clearly and intentionally surrendered. It is a wholesome right, which should receive sanction and approbation. * * *
>
> The depositary act of Illinois contains no express waiver of the State's preference right. It contains no provision which is inconsistent with the common law rule, on the contrary, it is ominously silent concerning

repeal. Its provisions for the protection of the public revenues are entirely compatible with the common law rule. No reason appears why this salient rule of protection of the public's interest should be discarded in order to subserve to a greater degree the interests of private individuals."

In conclusion we submit that the decision of the Circuit Court of Appeals is unsound as a matter of general law, and particularly under the law of the State of Illinois. We have attempted primarily to present to this Court certain considerations which directly and seriously affect the public interests involved. These, we believe, were overlooked by the Circuit Court of Appeals in deciding questions vitally affecting the City of Chicago.

Respectfully submitted,

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